In the Supreme Court
of the United States

OCTOBER TERM 1971

No. 71-900

UNION OIL COMPANY OF CALIFORNIA,
a corporation,

Petitioner,

v.

The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

Respondents do not accept petitioner's statement of the questions presented for review, and submit they are more accurately stated as follows:

1. Was it appropriate for the Court of Appeals, in determining whether the speed of a vessel was in excess of the "moderate speed" required by Article 16(a) of the Inland Rules, 33 U.S.C. § 192, to apply the "Rule of Sight" to the SANTA MARIA, a large tanker proceeding up a narrow river channel toward a fog bank, with knowledge that a tug and tow were coming down river in the fog, but unable to see the position or change of course of the tug and tow because of the fog, at a speed of 7-8 knots per hour, at which speed the tanker could not be stopped before reaching the point where she first saw the tug emerge from the fog, and was still going 3 to 7 knots at the moment of collision?

2. Should the rule that in mutual fault collision cases the damages are divided equally, which has been the well-established law of the United States for over a hundred years, be changed by judicial decision?

STATEMENT OF THE CASE

Petitioner's biased "statement of the case" should not be accepted.

A fair statement of the case is set forth in the first three pages of the Court of Appeals opinion, Petition, Appendix B, at pp. 27, 28, 29.

The essential facts are that SANTA MARIA was a large tanker, 550 feet long, 11,291 gross tons, fully loaded with 17,000 tons of petroleum products. She was proceeding upstream, in darkness at night, in a narrow channel of the Columbia River. She maintained a speed of 7 to 8 knots[1] while approaching a fog bank that concealed the downcoming tug and barge.[2] The SANTA MARIA knew of the presence of the tug and barge, but could not see their position or change of course because of the fog.

The tug crew sighted the mast lights of the SANTA MARIA looming through the fog, at less than 1,000 feet distance. Fearing imminent collision, the tug executed a sharp U-turn to its left and tried to run away from the tanker.[3] The tug actually completed the U-turn, and was making headway *up* river, going in the same direction as the SANTA MARIA,

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[1] One knot (nautical mile) = 6,000 ft.; 1 knot speed = 100 ft. per minute; 8 knot speed = 800 ft. per minute.

[2] The tug was 110 feet long, twin screw, 1500 HP; the barge was 275 feet long, on a 250 foot towline. They were proceeding at 7 knots, and slowed to 3½ knots on first hearing the SANTA MARIA's fog signal. (Transcript of testimony pp. 155, 171, 219).

[3] Transcript of testimony, pp. 161, 187, Exhibit 25.

at the time of the collision. The barge swung around behind the tug on its tow line, and was headed diagonally up river when struck by SANTA MARIA.

The SANTA MARIA sighted the tug emerging from the fog bank at about 900 feet distance, at which moment the tug was in the middle of its U-turn and proceeding across and at right angles to the course of SANTA MARIA.[4] SANTA MARIA immediately went full astern, but in one minute collided with the barge. (See diagram, page 5 for relative positions).[5] At the moment of collision, SANTA MARIA was still going 6-7 knots by testimony of her pilot.[6]

REASONS FOR DENYING THE WRIT

I

THE RULE OF SIGHT

None of the reasons set forth in Rule 19 as the criteria for granting certiorari exist in this case.

This case, like all collision cases, must be determined on its particular facts. SANTA MARIA's speed was clearly immoderate under Article 16(a), and the Court of Appeals properly so held.

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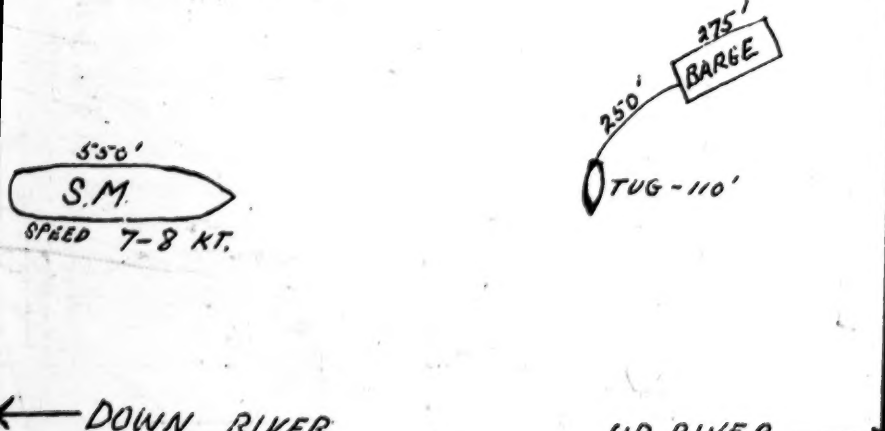
[4] Petition, Appendix A, p. 21, Tr. of testimony, p. 80.

[5] Based on Ex. 25, Tr. of Testimony, pp. 80, 111, 117, 118, 188, 192, 224.

[6] Her mate guessed she was going 3-4 knots at time of impact. Even the force of collision did not stop her; her momentum carried her onward and she was only stopped by running "fast aground" where she remained 11 hours until pulled off by tug boats (Ex. 3, Tr. 81-82, 84).

A. WHEN SANTA MARIA FIRST SAW TUG EMERGE FROM FOG, NOT OVER 900 FT. DISTANT (PET. APPX. B, p 30-31). TUG HEADED AT RIGHT ANGLE ACROSS BOW OF SANTA MARIA (PET. APPX A. p 21, TR. TESTIMONY p 80).



B. AT MOMENT OF IMPACT, TUG MAKING HEADWAY UPSTREAM. (EX. 25) SANTA MARI STILL GOING 6-7 KNOTS BY TESTIMONY OF HER PILOT.

The Court of Appeals held the "Rule of Sight," often called the "half-distance rule," applicable to the facts of this case. This rule, which originated in early decisions of this Court, and has been variously stated by the courts, in substance is:—to comply with the "moderate speed" requirement of Article 16(a), a vessel proceeding in or near a fog bank must reduce to such speed as will enable her, by immediately reversing her engines upon first sighting another vessel, to come to a stop before colliding with the other vessel. Thus if each vessel obeys the rule, each will be able to stop upon or before reaching the point of impact, and collision or serious damage will be avoided.

No Conflict

Petitioner's vision of a conflict with decisions of this Court, or decisions of other courts of appeal, is a mirage. It vanishes on close examination of the cases.

The "rule of sight" was first stated by this Court in *The Nacoochee*, 137 U.S. 330, 34 L. Ed. 687 (1890). The steamer NACOOCHEE was held in fault for going at half speed, 6-7 knots, in fog on the open ocean where she knew she might encounter the other vessel. This Court said:

> "She was bound, therefore, . . . to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog." 137 U.S. at p. 339, 34 L. Ed. at p. 690.

The rule was next stated in substantially the same language in the opinion by Mr. Justice Brown, in *The Umbria*, 166 U.S. 404, 41 L. Ed. 1053 (1897).[7]

Then in *The Chattahoochee*, 173 U.S. 540, 43 L. Ed. 801 (1899), holding a sailing schooner at fault for going 7 miles per hour in fog, the opinion by Justice Brown states:

> "It has been said by this Court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law." 173 U.S. at p. 548, 43 L. Ed. at p. 805.

It is clear that the rule laid down by this Court in these early cases requires each vessel to proceed only at such speed that she can be stopped within *her share* of the distance of visibility. The requirement is that they be able to stop "*in time to avoid a collision.*" Thus two approaching vessels, suddenly coming in sight of each other in the fog, must each be able to stop within one-half of the distance at which they first become visible, in order to avoid collision.

This was well stated by the late John W. Griffin

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[7] "The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law." *The Umbria*, 166 U.S. 404 at p. 417, 41 L. Ed. 1061.

in his leading American treatise on collision:

> "In the *Nacoochee*, and in *The Umbria*, . . . the Supreme Court said, not that the vessel need be able merely to stop within the visible distance, but that she must stop *'before she should collide with a vessel which she should see through the fog,'* 'provided that such approaching vessel is herself going at the moderate speed required by law.'
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> . . . . .
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> "The Supreme Court meant that each vessel must be able to stop before she reached the meeting point,—in other words, to restrict each vessel to her share of the visible distance. No other rule would accomplish the result." *Griffin, The American Law of Collision*, 1949, at pp. 294, 295.

The decisions of the Ninth Circuit in the present and past cases are clearly in accord with these decisions of the Supreme Court.

The same rule is followed generally in the maritime circuits. For example:

Second Circuit:

Anglo Saxon Petroleum Co. v. *United States*, 222 F.2d 75, rehearing 224 F.2d 86 (2 Cir. 1955).
The William H. Taylor, 278 F. 717 (2 Cir. 1922).
The Manchioneal, 243 F. 801 (2 Cir. 1917).

In fact, the rule is so well established that Learned Hand said "everybody knows" it:

> "Although Article 16, 33 U.S.C.A. § 192, only requires a vessel in a fog to 'go at a moderate speed,' *as everybody knows*, the courts have imposed a gloss upon this that 'moderate speed is that at which, if the other vessel also does her

duty, the vessel will be able to stop her way before they collide.'" (emphasis supplied) *Anglo Saxon Petroleum Co.* v. *United States*, supra at p. 77.

Third Circuit:

The Bohemian Club, 134 F.2d 1000, 1002-3 (1943).

Fourth Circuit:

City of Norfolk, 266 F. 641, cert. den. 253 U.S. 491, 64 L. Ed. 1028 (1920).

Fifth Circuit:

O/Y Finlayson-Forssa v. *Pan Atlantic S.S. Corp.*, 259 F.2d 11 (5 Cir. 1958), cert. den. 361 U.S. 882, 4 L. Ed. 2d 119 (1959).

In that case, Judge John R. Brown, an experienced admiralty practitioner and judge said:

"Without a doubt the circumstances called for the application of the traditional rule of sight by which the vessel must proceed at a rate of speed which will allow her to come to a stop within one-half limit of visibility. *The Tug Percheron*, 5 Cir., 246 F.2d 135, 1957 A.M.C. 1941; *The Nacoochee*, 137 U.S. 330, 339, 34 L. Ed. 687, 690; *The Umbria*, 166 U.S. 404, 417, 41 L. Ed. 1053, 1060; *Griffin on Collision*, pp. 288-296." 259 F.2d at p. 20.[8]

[8] The Court also said,
"... the Antinuous had to demonstrate that ... she could stop before she traversed one-half the distance she could see. *A. H. Bull SS Co.* v. *United States*, 2 Cir., 34 F.2d 614, 1929 A.M.C. 1175; *The Lillian Anne-Pennsylvania*, 2 Cir., 1934 A.M.C. 569, cert. den.; *Chesapeake & Dela-*

Ninth Circuit:

The Silver Palm, 94 F.2d 754 (9 Cir. 1938).
The Ernest H. Meyer, 84 F.2d 496 (9 Cir. 1936).
U. S. v. *Motorship Hoyanger*, 265 F. Supp. 730 (W.D. Wash. 1967).
Weyerhaeuser S.S. Co. v. *U. S.*, 174 F. Supp. 663 (N.D. Cal. 1959).

Petitioner's Authorities

Certainly it is true that this Court, in *The Umbria* and *The Chattahoochee*, and many of the decisions of the lower courts, state that "moderate speed" is a relative term dependent upon the circumstances. But at the same time, the determination of what is moderate cannot be left wholly to the discretion of the navigator. There must be some minimum standards. And therefore, quite consistent with the concept that "moderate speed" depends on the circumstances, this Court, and the lower courts, have pronounced the "Rule of Sight" as a minimum standard.

In its effort to show "conflict," petitioner relies primarily on the decision of the Fifth Circuit Court of Appeals in *Hess Shipping Corp.* v. *S.S. Charles Lykes*, 417 F.2d 346, on reh. en banc, 424 F.2d 633, cert. den. 400 U.S. 853, reh. den. 400 U.S. 931.

But *Hess Shipping* does not reject the Rule of

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ware Steamboat Company v. *The Tug Pennsylvania*, 293 U.S. 575, 55 S. Ct. 86, 79 L. Ed. 673, 1934 A.M.C. 1410; *The Goldshell-White Plains*, 2 Cir., 224 F.2d 86, 1955 A.M.C. 1438; *Marsden's Collisions at Sea*, 10th Ed. 1953, pp. 479-480." 259 F.2d at p. 21, cert. den. 361 U.S. 882, 4 L. Ed. 2d 119 (1959)

Sight; it only allowed an exception in the particular case where a speed greater than "Rule of Sight" speed was absolutely essential to keeping the vessel under control.

Prior to *Hess Shipping*, the Fifth Circuit adhered staunchly to the Rule of Sight. *O/Y Finlayson-Forssa* v. *Pan Atlantic Steamship Corp.*, 259 F.2d 11, 22 (1958), cert. den. 361 U.S. 882, 4 L. Ed. 2d 119 (1959). See the excerpts from that opinion set forth *ante*, p. 9. The Court in *Hess Shipping* recognizes the "Rule of Sight," and cites its prior opinion in *O/Y Finlayson-Forssa*, but allows the exception where any further reduction in speed would have increased the hazard of a more serious collision.[9]

Therefore, what *Hess Shipping* actually did was to qualify the Rule of Sight by allowing the vessel to maintain bare steerageway. Chief Judge John R. Brown dissented in most vigorous terms.[10] On the re-

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[9] The Hess opinion states:

"Whether a court recognizes the 'Bare Steerage Rule,' i.e., that 'speed should be reduced to the lowest point consistent with good steerage way' *Skibs A/S Siljestad* v. *Mathew Luckenbach*, 215 F. Supp. 667, 679 (S.D. N.Y. 1963), or the 'Rule of Sight,' i.e., 'the vessel must proceed at a rate of speed which will allow her to come to a stop within one-half limit of visibility.' *O/Y Finlayson-Forssa A/B* v. *Pan Atlantic S/S Corp.*, 259 F.2d 11, 20 (5 Cir. 1958), both of which are tempered by and subject to analysis under the existing circumstances, . . . The facts support and justify a conclusion that any reduction in speed would have seriously impaired the pilot's ability to control the vessel, which might have resulted in a more serious accident than that which occurred." 417 F.2d at pp. 349-350.

[10] In *The Pennsylvania*, 86 U.S. 125, 134, 22 L. Ed. 148, 151 (1874), where the steamship argued her 7 knot speed was necessary for steerageway, the Supreme Court rejected the

hearing en banc, the fourteen judges were evenly divided, seven to seven, and so the judgment was affirmed by operation of law. The case is one decided on unusual particular facts, and is the exception that proves the rule.

The holding in *Hess Shipping* is not in conflict with the present decision of the Ninth Circuit, for, as the opinion in the present case states, SANTA MARIA cannot qualify for the "Bare Steerage-way" exception allowed in *Hess Shipping:*

> "But we have no evidence that the SANTA MARIA could not be safely navigated at less than seven to eight knots."[11]

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excuse. See also Learned Hand's opinion on this point in *Anglo-Saxon Petroleum Co.* v. *United States,* 224 F.2d 86 (2 Cir. 1955); "Failure to comply with the moderate speed requirement in fog is not excused by the desire to maintain steerageway." *Afran Transport Co.* v. *The Bergechief,* 170 F. Supp. 893, 899 (S.D. N.Y. 1959); *Holland-America Line* v. *M/V Johs. Stove,* 286 F. Supp. 69 at 72 (S.D. N.Y. 1968)

[11] Opinion of Court of Appeals, Petition, Appendix B, p. 33.

To the contrary, Santa Maria's helmsman, with 22 years experience, testified his vessel 'steered good" (Ex. 26, p. 9), and steered just as well at slow speed as at half or full speed:

> "Q. Is it more difficult to hold an exact course when you are going at slow speed?
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> A. I don't find it so, no. If you give it enough wheel, she will hold her course real good.
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> . . . . .
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> Q. Now, does it make any difference whether you are going full speed, half speed or slow speed and fully loaded?
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> A. Not if you give it enough wheel it doesn't make any difference. . . ." (Dep. of oMrgan, Ex. 26, p. 17).

The pilot testiifed, 'You can't slow a loaded ship, any ship, tanker or otherwise, from a full ahead to aslow bell without losing your steering. You have to reduce it slowly. But after you once get the speed off, they handle very good." (Petition, Appendix B, p. 33).

The remaining cases cited by petitioner for "conflict" are from the Second and Third Circuits (Petition, p. 6). But none are in conflict with the present decision of the Ninth Circuit. To the contrary, all adhere to the "Rule of Sight" or an even stricter rule.

Polarus S.S. Co. v. *T/S Sandefjord*, 236 F.2d 270 (2 Cir. 1956) recognizes the rule of sight:

> "The purpose of the statute, spelled out in the 'sight rule,' is to require generally and not absolutely that a vessel proceed only at such speed that it can stop before striking another vessel which comes into the range of its vision." 236 F.2d at p. 272.

The POLARUSOIL was exonerated because it was "stopped in the water" at the time of collision.

The *Bayonne*, 213 F. 216 (2 Cir. 1914), states that under the rule of *The Umbria*, the vessel's speed is not moderate "if the vessel cannot avoid another vessel which is herself complying with the law, after discovering her." 213 F.2d at p. 217. In that case the

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It is also significant that SANTA MARIA's Log Book (Ex. 3) and Engine Bell Book (Ex. 4) establish that a few hours previously, but while being navigated by a *different pilot*, she *did* navigate at *slow* speed in the Columbia River near Astoria for 18 consecutive minutes (1735½ to 1753½).

SANTA MARIA also could, and should, have anchored if unable to proceed at a moderate speed. *The Pennsylvania* v. *Troop*, 86 U.S. 125, 134, 22 L. Ed. 148, 151; *Holland-America Line* v. *M/V Johs. Stove*, 286 F. Supp. 69, 72-73 (S.D. N.Y. 1968); *Norscott Shipping Co. Ltd.* v. *President Harrison*, 308 F. Supp. 1100, at 1106 (E.D. Pa. 1970). Her Log Book shows that she anchored repeatedly on the following day on occasions when she encountered fog while proceeding the rest of the way up the river to Portland (Ex. 25, pp. 12-13).

vessel was held at fault for a speed of 3½ miles an hour.

Villain & Fassio E Compagnia v. *The Tank Steamer E. W. Sinclair*, 207 F. Supp. 700 (S.D. N.Y. 1962), aff'd 313 F.2d 722, gives no support to the claim of conflict. The opinion states:

> "The rule is stated not only in terms of the range of visibility but also in terms of requiring the vessel to be able to stop before a collision occurs." 207 F. Supp. at 707.

Skibs A/S Siljestad v. *S/S Mathew Luckenbach*, 215 F. Supp. 667 (S.D. N.Y. 1963), aff'd 324 F.2d 563, suggests an even stricter rule. After stating "Some courts have applied the Rule of Sight, viz., to be able to stop within the vessel's share of the visibility," the opinion proceeds:

> "Perhaps, too, the decisional law in this circuit is even stricter than either the Bare Steerageway Rule or the Rule of Sight for in *Afran Transport Co.* v. *The Bergechief*, 274 F.2d 469, 473 (2 Cir. 1960), the *BERGECHIEF* was condemned for maintaining steerageway in dense fog in the absence of a current of substantial force." 215 F. Supp. at p. 679.[12]

In *Oil Transfer Corp.* v. *Westchester Ferry Corp.*, 173 F. Supp. 637 (S.D. N.Y. 1958), Judge Learned Hand applied an even stricter rule. In this case the ferry endeavored to justify her 7 knot speed by claiming that, with propellers at each end of the vessel,

[12] *The Mathew Luckenbach's* speed of 7 knots was held excessive.

she could stop in half the distance of visibility. Judge Hand recognized the general rule:

> "It is quite true that the generally accepted rule is that a vessel may travel in a fog at a speed that will allow her to stop within the distance of the existing visibility if she meets another vessel who can also stop within that distance. That would of course mean half the distance of the visibility if the meeting vessel was moving at the same speed, and the Ninth Circuit appears to have made this the test." 173 F. Supp. at p. 639.

But Judge Hand said even this rule might be too lenient, because some allowance should be made for the time it takes to put the engines full speed astern after sighting the opposing vessel. He held the ferry at fault for 7 knot speed.

Judge Hand's endorsement of the Rule of Sight is made even more clear by his "as everybody knows" statement (ante p. 8) in his subsequent opinion for the Second Circuit Court of Appeals, in *Anglo Saxon Petroleum Co.* v. *United States*, 222 F.2d 75.

And upon rehearing of that case he rejects the steerageway excuse, on authority of *The Pennsylvania*, 19 Wall. 125, 133, 134, 86 U.S. 125, 133, 134, 22 L. Ed. 148, and states:

> "Though we were to accept this as true (necessary to maintain steerageway) it would not be an excuse for exceeding 'moderate speed' as we defined it in our original opinion: *The command is imperative.*" (Emphasis supplied) 224 F.2d 86 (2 Cir. 1955).

The two cases cited from the Third Circuit, *The Bohemian Club*, 134 F.2d 1000 (3 Cir. 1942) and *C. F. Norscott Shipping Co.* v. *Steamship President Harrison*, 308 F. Sup. 1100 (E.D. Pa. 1970) are fully in accord with the general rule of sight and present no conflict.

Petitioner's Objections to the Rule of Sight

Petitioner's objections to the Rule of Sight (Petition pp. 9-12) are wholly unfounded.

It is stated that the rule fails to take account of particular circumstances such as position of the vessels, weather, size and maneuverability of the vessels, etc. But these are, of course, the very factors that enter into the ability of the vessel to stop within her share of the distance. If the visibility in the fog is half a mile, obviously a vessel can go much faster than if visibility is only a hundred yards. If a strong headwind could help stop a vessel, that again may be considered. A twin screw vessel able to stop more quickly by extra power astern on the engines may be permitted a speed greater than one not so equipped. A fully loaded vessel may have to proceed more slowly than the light vessel, due to the fact that her momentum will carry her further. All that the vessel must do to comply with the rule is to proceed at *such* speed, that she can be stopped in time to avoid collision after sighting the other vessel. And of course all these factors enter into her ability to stop at such distance.

The fact is that in the present case, SANTA MA-

RIA not only was unable to stop, even after traversing the entire distance (rather than half the distance);—she was still going at from 3 to 7 knots, and her forward momentum was not checked until she ran aground on beyond the point of collision. Her speed was clearly excessive under all the circumstances and can not even be justified by necessity to maintain steerageway (ante p. 12, footnote 11).

The objection based upon "uniformity" of course vanishes along with the mirage of "conflict."

As the opinion of the Ninth Circuit states, the Rule of Sight promotes safety. Judge Learned Hand's remarks are most appropriate:

> "The fact that the rule is more honored in the breach than in the observance merely means that people are usually willing to take chances rather than submit to the galling necessity of poking about in a fog; and, although the usual measure of the care demanded is that commonly used in the calling, that is not the inevitable standard. Common prudence is not always adequate prudence; the courts may and at times do condemn practices that are current in the business." *Anglo-Saxon Petroleum Co.* v. *United States*, 222 F.2d 75, 78 (2d Cir. 1955).

Relaxation of the Rule of Sight to the point urged by petitioner, leaving speed in fog entirely to the discretion of the navigator, with no judicial standards, would benefit only the lawyers who handle collision cases.

A final word as to Article 16 and the Rule of

Sight. The rule has been enforced as a judicial "gloss" of Article 16 for many years. Congress had "moderate speed" under consideration when adopting the Radar Annex to the Rules of the Road in 1963, 33 U.S.C.A. § 1094. It could have, but did not, make any relaxation in the Rule of Sight.[13]

II

EQUAL DIVISION OF DAMAGES

The Court of Appeals, in holding that SANTA MARIA's fault renders her liable for equal division of damages, followed the decisions of this Court and the established law.

What petitioner admittedly asks is that this Court assume a legislative role and change a rule which has been settled law in this country for more than 100 years.[14]

The rule that where both vessels are at fault the

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[13] To the contrary, the new Annex provides:
"Radar indications of one or more vessels in the vicinity may mean that 'moderate speed' should be slower than a mariner without radar might consider moderate in the circumstances." 33 U.S.C.A. § 1094(2).

[14] Petitioner's complaint (Petition p. 13) of the supposed inequity of the divided damages rule as applied to the facts of this case seems outside the scope of a Petition for Certiorari. The Court of Appeals simply said the fault of Santa Maria could not be excused because the fault of the tug was *more* flagrant and shocking, which implies that the fault of SANTA MARIA was *also* flagrant and shocking. (Pet. Appx. B, p. 36). Indeed, on the facts, SANTA MARIA's speed which resulted in her inability to stop, and still going at 3-7 knots after traversing the *entire* distance of visibility, clearly contributed to the collision and was a major statutory fault, substantially equal to the fault of the tug.

damages are divided equally (rather than in proportion to degree of fault) was first pronounced by this Court in *The Schooner Catharine* v. *Dickinson*, 58 U.S. (17 How.) 170, 15 L. Ed. 233 (1855). This was followed by a long line of cases which firmly established the rule:

> "Cases also arise where both vessels are in fault; and the repeated decisions of this court have established the rule, that in that contingency the damages shall be equally apportioned between the offending vessels as having been occasioned by the fault of both. *The Catharine* v. *Dickinson*, 17 How. 177, 15 L. Ed. 235; *The Sunnyside*, ante, 302 (91 U.S. 208, 23 L. Ed. 302); *The Continental*, 14 Wall. 355, 20 L. Ed. 802; *The Morning Light*, 2 Wall. 560, 18 L. Ed. 864; *The Pennsylvania*, [*U. Steamship Co.* v. *N. Y. & Va. Steamship Co.*], 24 How. 313, 16 L. Ed. 701." *Phoenix Ins. Co.* v. *The Atlas*, 93 U.S. 302, 319, 23 L. Ed. 863, 868 (1876).

The rule has been followed consistently by the lower courts in literally hundreds of cases. And this Court has consistently denied certiorari. See, for example, *In re Adams Petition* (Melrose-Sandcraft), 237 F.2d 884, 887 (2 Cir. 1956), cert. den. 352 U.S. 971, 1 L. Ed. 2d 325 (1957); *The A. C. Dodge*, 234 F.2d 374 (2 Cir. 1956), cert. den. 352 U.S. 928, 1 L. Ed. 2d 163 (1956); *National Bulk Carriers, Inc.* v. *United States*, 183 F.2d 405, 410 (2 Cir. 1950), cert. den. 340 U.S. 865, 95 L. Ed. 631 (1950).

In 1952, this Court referred to the rule as "established admiralty doctrine."

> "Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases. . . ." *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 at p. 284, 96 L. Ed. 318 at p. 319.

It is true, as petitioner points out, that the rule of equal division of damages has been criticized by some judges of the lower courts, and by a few academic writers, and that the Brussel's Convention of 1910, which provides that damages be apportioned in accordance with the degree of fault of each vessel, has been adopted by many of the maritime nations of the world.[15]

However, the Brussel's Convention was submitted to the United States Senate in 1937, and failed to receive approval. In 1947 it was returned to the President without having been acted upon.[16]

In 1962 a bill (S. 2313) to provide for proportional fault in collision cases was before the Senate, and reached the floor sponsored by Senator Bartlett of Alaska. But in the face of objections by interested

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[15] England followed the rule of equal division of damages, see *Marsden's Collisions at Sea*, Sixth Ed. (1910) pp. 123, 124, until after its adherence to the Brussel's Convention.

[16] See Senate Report 1603, 87th Congress, 2nd Session; *Knauth, Benedict on Admiralty*, 7th Ed. Vol. 6, p. 38.

groups, it was "indefinitely postponed" by unanimous consent.[17]

The very fact that the Brussel's Convention has repeatedly failed to win Congressional approval indicates that the Congress has no desire to change the law as it has been settled in this country for over 100 years.

Moreover, there has been no recent clamor by steamship companies, marine insurance companies, or shipping interests, seeking to change the rule. This appears to indicate general satisfaction, or at least acceptance, of the settled law on the part of shipping and commercial interests, despite the criticisms that have come from a few academic writers.

Under these circumstances, what was said by this Court in *Halcyon Lines* seems to be quite appropriate:

> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await Congressional action. . . . A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the *Halcyon Line* is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit." *Halcyon Lines* v. *Haenn Ship*

[17] Congressional Record, 87th Congress, 2nd Session, Vol. 108, Part 16, page 21249.

Ceiling & Refitting Corp., 342 U.S. 282 at pp. 285-286, 96 L. Ed. 318 at pp. 320-321 (1952).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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February 4, 1972

BRIEF FOR THE PETITIONER

In the Supreme Court of the United States

OCTOBER TERM 1971

No. 71-900

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Petitioner,

v.

The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been officially or unofficially reported; the full text of the opinion appears in the Appendix to the petition for writ of certiorari.

The opinion of the United States District Court

for the District of Oregon is reported at 304 F. Supp. 519 (D. Or. 1969).

JURISDICTION

The judgment of the court of appeals was entered December 2, 1971. The petition for writ of certiorari was filed on January 10, 1972, and was granted on February 28, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254 and 28 U.S.C. § 2101(c).

STATUTE INVOLVED

Article 16 of the Navigation Rules for Harbors, Rivers, and Inland Waters Generally (Inland Rules), 30 Stat. 99, 33 U.S.C. § 192:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> "A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

QUESTIONS PRESENTED FOR REVIEW

1. Does Article 16 of the Inland Rules, 33 U.S.C. § 192, which provides that "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed," permit a court of appeals to adopt

a rule that a vessel navigating near a fog bank must proceed at a speed which would enable her to be stopped in one-half the distance between her and a point along her projected course at which she might collide with any vessel emerging from the fog on any course?

2. Does the admiralty rule of equal division of damages apply to a collision in which one vessel has been flagrantly negligent while the other vessel has committed a minor statutory infraction which may not even have been a contributing cause of the collision?

STATEMENT OF THE CASE

This case involves a collision on the Columbia River between petitioner's tanker, the Santa Maria, and a barge towed by respondent's tug, the San Jacinto, after the tug made an abrupt U-turn in front of the tanker. The owners of the vessels sued one another by complaint and cross-complaint (R. 1), each claiming that the other was solely at fault. The district court absolved petitioner's tanker from blame and held respondent's tug and barge in violation of numerous rules of navigation (A. 21-23).[1] The court of appeals reversed, holding petitioner liable for half damages on the grounds that its tanker had violated Article 16 of the Inland Rules (the moderate speed in fog rule)

[1] The opinions rendered in the courts below were printed in the Appendix to the petition for writ of certiorari, and all references are to that Appendix.

and that petitioner was unable to prove that this statutory violation could not have contributed to the collision (A. 36).

The collision occurred in darkness at 8:32 p.m. on December 24, 1967. In the area of collision the Columbia River is approximately 1,500 feet wide; the ships' channel is 500 feet wide (R. 12). Petitioner's tanker, carrying 17,000 tons of petroleum products, was proceeding upstream on the Oregon side of the channel under the command of a licensed Columbia River pilot who had been sailing the Columbia since 1928 and had piloted over 2500 ships on the river (R. 63-4). The tanker was traveling at half speed, approximately 7 to 8 knots. Visibility along her course was one and one-half to two miles in haze and slight drizzle. A bank of fog lay upstream of the tanker along the Washington side of the river and to the left of the tanker's course (A. 27).

Respondent's tug was upstream of the tanker proceeding downstream close to the Washington bank. It was towing a barge loaded with lumber at the end of a 250 foot cable (A. 27-29). The tug was encountering intermittent fog and was attempting to feel its way downriver by following the contours of the Washington bank visually and on radar. The tug was unaware of the tanker's approach (A. 28). The crew of the tug was inexperienced; the captain was 29 years of age, had been captain only three months, was unlicensed and had navigated the Columbia River only four or five times (A. 28, R. 151, 166-7). When it was about a mile ahead of the tanker the tug entered the

fog bank (A. 28). The captain of the tug then became disoriented (A. 29); he testified that the tanker's lights appeared off the tug's starboard bow (R. 160). Believing collision to be imminent, the tug captain executed a sharp U-turn to the left (A. 28). This turn took the tug into the path of the oncoming tanker (A. 22).

Meanwhile, the tanker's pilot had sighted the tug visually and on radar more than a mile upstream well over on the Washington side of the channel. The pilot lost visual contact with the tug when it entered the fog (A. 28).[2] The tanker's third mate, who was on the bridge with the pilot and the captain, testified that he visually sighted the tug through binoculars when it was approximately "four points on the port bow"[3] heading downstream (R. 108-110). The mate observed the tug commencing its left turn and immediately notified the pilot, who ordered the tanker's engines full astern and sounded danger signals (A. 29). The tug completed its turn in front of the tanker, but the barge it was towing swung in a wide arc and struck the port bow of the tanker driving it aground on the Oregon bank (A. 21). Estimates of the tanker's speed at the time of collision range between three and seven knots (A. 29).

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[2] While the Court of Appeals stated that the tanker's pilot did not follow the tug's progress by radar (A. 28), the pilot testified that he ascertained the tug's position by radar at least two times after losing visual contact and that one does not *continuously* watch the radar scope in a situation such as this (R. 101-2). The third mate testified that the pilot repeatedly referred to the radar scope after sighting the tug (R. 108).

[3] Four points = 45 degrees.

The district court found that the collision was solely the fault of the tug (1) in navigating at an unreasonable speed in fog; (2) in failing to maintain a proper lookout in order to ascertain the position and course of the tanker; (3) in pulling the tow across the channel; (4) in failing to ascertain the risk of collision and sound the danger signal; (5) in failing to sound fog signals; (6) in failing to reduce speed, stop or take evasive action to avoid crossing the tanker's bow; (7) in turning into the path of the tanker and thereby navigating on the wrong side of the channel; and (8) in failing to keep the tow in control (A. 22). The court found further that the tanker had remained on its own side of the channel (A. 21). The court of appeals concurred in these findings and noted that respondent conceded the tug's negligence (A. 28-9). Nevertheless the court of appeals held that the tanker's speed of seven to eight knots was immoderate and therefore in violation of Article 16 of the Inland Rules (A. 30). Since the tanker was unable to prove that her speed could not possibly have contributed to the collision, she was ordered to share the damages equally with the tug (A. 36).

SUMMARY OF ARGUMENT

The court of appeals held that the tanker Santa Maria was proceeding at an immoderate speed parallel to a fog bank from which the tugboat San Jacinto unexpectedly emerged, because at seven knots the tanker could not stop in one-half her distance from the point at

which the tugboat emerged. This holding is an impermissible interpretation of the statutory command to go at a "moderate speed, *having careful regard to the existing circumstances and conditions.*" The tanker was on the right side of a narrow channel, where it was highly unlikely that she would meet another vessel on a crossing course; the tug had been observed visually and on radar on the other side of the river, and the tanker could rightfully presume that the tug would remain on her side and continue her course; the fog was intermittent; the tanker's pilot was vastly experienced; the low speed required by the court's rule may have been more dangerous than the seven knots at which the tanker was going—all of these circumstances should have been taken into account in determining moderate speed, but were not. The language and legislative history of the statute make it clear that these circumstances should have been considered. Virtually every other court would have considered them. Despite the court's assurances of added safety, the half-distance rule in many cases would be unworkable and would lead to greater danger by causing ships to drop anchor and clog narrow channels. The purpose of Article 16 is to prevent the danger of collision; the tanker's speed did not pose any such danger.

The admiralty rule of dividing damages where both ships in a collision are negligent has become thoroughly discredited and has been rejected by every other major maritime nation. The modern rule, to apportion damages according to fault, has been ap-

proved by this Court, and by Congress in modern maritime legislation, and has the support of judges, government and business. This Court adopted the divided damages rule and has unquestioned authority to change it. Given the extreme disparity of fault in this case (should the tanker be found negligent), justice demands that this Court not apportion damages equally.

ARGUMENT

I. The Half-Distance Rule Is an Impermissible and Unworkable Interpretation of Article 16 of the Inland Rules

The court of appeals held that petitioner's tanker violated Article 16 of the Inland Rules,[4] which reads:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a *moderate speed, having careful regard to the existing circumstances and conditions.*" (Emphasis added).

In reaching its decision the court imparted a gloss to the term "moderate speed," defining it to mean, where a ship is immersed in fog,

> " 'a speed at which she [can] be stopped dead in the water in one-half the visibility before her.' " (A. 30).

Where, as in this case, a ship is navigating *near* fog,

> "The speed and visibility calculations must be performed: '. . . with reference to the distance within which she could be brought to a stop in the water, before *any* course of *any* vessel emerg-

[4] 33 U.S.C. § 192.

> ing from the fog on either side would cross her projected course along the fog bank at its nearest point.' *The Silver Palm*, 94 F.2d 754, 767 (9th Cir. 1937) (Emphasis in original)." (A. 31).

Petitioner's basic contention is that this so-called half-distance rule is an impermissible and unworkable interpretation of Article 16 because it does not have "careful regard to the existing circumstances and conditions." The court disregarded the following circumstances and conditions which, had they been considered, would have led to the conclusion that the tanker's speed was moderate:

1. *The probability of meeting other vessels.* The tanker was navigating parallel to a fog bank in a narrow channel. The probability of its meeting another vessel emerging from the fog bank on a crossing course was slight.[5]

2. *The probability that the tug would act unlawfully.* The tanker observed the tug both visually and on radar proceeding downriver on the Washington side. The tanker was entitled to the presumption that the tug would remain on its side of the river and continue its course. *The Victory*, 168 U.S. 410, 426, 18 S. Ct. 149, 42 L. Ed. 519 (1897); *The Acilia*, 120 F. 455, 461 (4th Cir. 1903); *The Gerry*, 161 F. 413, 418 (1908).

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[5] Article 25 of the Inland Rules: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to the side of the fairway or mid-channel which lies on the starboard side of such vessel." 33 U.S.C. § 210.

3. *The nature of the fog.* The fog was intermittent or "patchy" (A. 21, R. 170-171). The risk of navigating near such a condition is smaller than when the fog is pervasive, especially when, as here, the patches of fog lie off the vessel's course.

4. *The experience of the tanker's pilot.* What is moderate speed when a ship is navigated by an experienced pilot may not be moderate speed when the pilot is inexperienced. Here the pilot was not only vastly experienced in navigation, but had made many voyages on the Columbia and was quite familiar with local conditions and topography.[6]

5. *The dangers of an excessively slow speed.* The speed required by the half-distance rule may have been too slow to maintain steerageway, which would have obliged the tanker to drop anchor and thereby hinder traffic through the channel.

By ignoring these factors and focusing merely on visibility and the ship's stopping ability, the half-distance rule violates the statutory command to have "careful regard to the existing circumstances and conditions," the legislative history and purpose of the statute, the overwhelming weight of judicial authority, and elementary principles of navigation.

A. Legislative History and Purpose of Article 16

Article 16 of the Inland Rules was adopted by

[6] See *The Munster* (1939), 63 Ll. L. Rep. 165, 169 (master's knowledge of local conditions is one of the circumstances considered by the court in determining moderate speed).

Congress in 1897.[7] Its wording is identical to the original wording of Article 16 of the *International* Rules which apply on the high seas, and which were enacted by Congress in 1890.[8] The International Rules were drafted at the 1889 International Conference of Maritime Nations which was attended by jurists, admiralty lawyers and shipowners as well as seafaring men. W. LABOYTEAUX, THE RULES OF THE ROAD AT SEA (1920) 3. The following account of deliberations by delegates to the Conference provides unmistakable evidence of their intended interpretation of the term "moderate speed" in Article 16:

> "This rule was most thoroughly considered and discussed at the International Conference, by which it was regarded as one of the most important rules of the road.
>
> "Many of the delegates held the view that the words 'moderate speed' which were in the then existing rule should be more precisely defined. Some delegates were strongly in favor of fixing a maximum speed beyond which no vessel in a fog should be permitted to proceed. It was, however, the general sense of the Conference that, whilst a more accurate description was desirable, it was impracticable to frame a rule which would precisely define 'moderate speed' as applicable under all the varying circumstances and conditions of navigation.

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[7] Act of June 7, 1897, c. 4, § 1, 30 Stat. 99.

[8] Act of August 19, 1890, c. 802, § 1, 26 Stat. 325. The International Rules were amended in 1948 and again in 1960. The current Article 16, 33 U.S.C. § 1077, differs in wording from Article 16 of the Inland Rules in respects not pertinent here. Article 16 of the Inland Rules has never been amended.

"As was stated by a number of the delegates, the words 'moderate speed,' as used in this rule, constitute a relative term which cannot be so defined as to apply in all cases. What would be a moderate speed under some circumstances, as, for instance, the speed of a steamer in an unfrequented part of the ocean, would be an excessive speed under different conditions, as, *e.g.*, in approaching port where other vessels are apt to be met.

"The views of the Conference are most clearly expressed by the wording of the present rule:

> 'Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard for the existing circumstances and conditions.'

"It was said by the delegate from the United States:

> '. . . in the flexibility of this rule is its safety. Its flexibility permits a man to adapt his speed according to circumstances; and the duty which is put upon him by this rule is that he shall comply with it according to the circumstances under which he finds himself placed.' *Protocol of Proceedings, p. 343.*

"Amongst the circumstances and conditions for which careful regard must be had in determining what shall constitute moderate speed, the following were mentioned in the discussion before the conference:

> The density of the fog and the condition of the weather for hearing fog signals;
>
> Whether the vessel is in narrow waters or on the broad ocean;

Whether on fishing grounds or in frequented or unfrequented waters;

The possibility or probability of meeting other vessels;

The readiness with which a vessel (if laden or in ballast) is able to maneuver;

The quickness with which she can be brought to a standstill with the reserve of steam available for that purpose;

Her position with respect to heavy tideways, strong currents or other dangers." W. LABOYTEAUX, *supra*, at 76-78.

The half-distance rule ignores most of these considerations.

The most recent legislative guide to the interpretation of Article 16 was furnished by Congress' enactment in 1963 of the "Radar Annex" to the International Rules.* This Annex was proposed by the International Conference of 1960 which entitled it "Recommendations on the Use of Radar Information as an Aid to Avoiding Collisions at Sea." Subsection (2) provides:

"A vessel navigating with the aid of radar in restricted visibility must, in compliance with Section 1077(a) [Article 16] of this title, go at a moderate speed. *Information obtained from the use of radar is one of the circumstances to be taken into account when determining moderate speed.*" (emphasis added).

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* Pub. L. 88-131, § 4, September 24, 1963, 77 Stat. 209, 33 U.S.C. § 1094.

Petitioner's tanker determined by radar as well as visually that the tug was proceeding downstream on its own side of the river. Taking this information into account, as the Radar Annex would permit him to do, the pilot of the tanker was entitled to the presumption that the tug would make an ordinary port-to-port passing.[10] *The Victory*, *supra*. Yet the court of appeals rejected petitioner's contention that radar observations were pertinent in determining moderate speed (A. 31-33).

It is evident from these indicia of legislative purpose that a rule which focuses merely on visibility and stopping distance is an impermissible interpretation of the statute.

The fundamental purpose of requiring a ship navigating in or near fog to go at a moderate speed is to prevent it from posing a danger to other vessels. See *The "Colorado,"* 91 U.S. 692, 702-3 (1875); *The Pennsylvania*, 86 U.S. 125, 133-4 (1874).

> "The rule laid in [*The Batavier*, 40 Eng. L. & Eq. 19, 25] is that, at whatever rate a steamer was going, if she was going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate. . . .
>
> "The rule is still maintained . . . in Article 16 . . . ." *The Nacoochee*, 137 U.S. 330, 339, 11 S. Ct. 122, 34 L. Ed. 687 (1890).

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[10] The court of appeals: "Had the tug continued downstream the vessels would have passed safely port to port." (A. 29).

Unless the speed of a vessel in or near fog is so great as to create a danger to other vessels in the area, or which reasonably may be expected to be in the area, it has not violated Article 16. There has been no finding in this case that the Santa Maria's speed posed a danger to other vessels; thus, there is no justification for finding that she violated Article 16.

B. Moderate Speed As Defined by the Courts

The Ninth Circuit Court of Appeals is the only court to adhere to the half-distance rule. The rule adopted by other courts of appeal as well as this Court is that moderate speed is relative and depends upon the circumstances of each case.[11] In *The Pennsylvania*, 86 U.S. 125, 133 (1874), this Court stated:

> "What is [moderate] speed may not be precisely definable. It must depend upon the circumstances of each case. That may be moderate and reasonable in some cases which would be quite immoderate in others."

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[11] Supreme Court: *The Pennsylvania*, 86 U.S. 125 (1874); *The Chattahoochee*, 173 U.S. 540, 19 S. Ct. 491, 43 L. Ed. 801 (1899); *The Umbria*, 166 U.S. 404, 17 S. Ct. 610, 41 L. Ed. 1053 (1897).

First Circuit: *Gertrude Parker, Inc.* v. *Abrams*, 178 F.2d 259, 264 (1949).

Second Circuit: *Polarus S/S Co.* v. *The T/S Sandefjord*, 1956 A.M.C. 1779, 236 F.2d 270 (1956).

Third Circuit: *The Bohemian Club*, 134 F.2d 1000 (1942), rev'd on other grounds, 320 U.S. 462, 64 S. Ct. 225, 88 L. Ed. 168 (1943).

Fifth Circuit: *Hess Shipping Corp.* v. *SS Charles Lykes*, 417 F.2d 346 (1969), aff'd on reh. en banc, 424 F.2d 633, cert. den. 400 U.S. 853, reh. den. 400 U.S. 931.

Seventh Circuit: *Erie & W. T. Co.* v. *City of Chicago*, 178 F. 42 (1910).

In *The "Colorado,"* 91 U.S. 692, 702 (1875):

> "Great difficulty would attend any effort to define, with mathematical precision, what is a moderate speed in any particular case, further than to say that the speed ought not to be so great that the steamer cannot perform the duty imposed upon her by the Act of Congress—'to keep out of the way of the sailing vessel,' *if the latter has in all respects complied with the rules of navigation.*" (Emphasis added).

Justice Addison Brown, an acknowledged admiralty authority, frequently considered the issue of moderate speed in fog. In *The Chattahoochee*, 173 U.S. 540, 19 S. Ct. 491, 494, 43 L. Ed. 801 (1899), he stated:

> "No absolute rule can be extracted from these cases. [The Court examined English and American cases involving excessive speed.] So much depends upon the density of fog *and the chance of meeting other vessels in the neighborhood*, that it is impossible to say what ought to be considered moderate speed under all circumstances." (Emphasis added).

Circumstances which Justice Brown felt were relevant include

> "the density of the fog; the place of navigation; the probable presence of other vessels likely to be met; the state of the weather as affecting the ability to hear the fog signals of other vessels at a reasonable distance; the full speed of the ship herself, her appliances for rapid maneuvering, and the amount of her steam power kept in reserve, as affecting her ability to stop quickly after

> hearing fog signals." *The Normandie*, 43 F. 151, 156 (S.D. N.Y. 1890).

See also *The Martello*, 154 U.S. 64, 70, 14 S. Ct. 723, 725, 38 L. Ed. 637 (1893); *The Umbria*, 166 U.S. 404, 17 S. Ct. 610, 41 L. Ed. 1053 (1897).[12]

The rule in England is in accord with these decisions. See, e.g., *The Bharatkhand*, (1952) 1 Lloyd's List L.R. 470. Under English doctrine, the mere fact that there is fog in the vicinity does not make it obligatory to navigate at a moderate speed. See *The Bernard Hall*, (1902) 9 Asp. M.C. 300.

Ironically, the Ninth Circuit's half-distance rule seems to have originated in a misinterpretation of *The Chattahoochee* and *The Umbria*. See *The Silver Palm*, 94 F.2d 754, 757 (9th Cir. 1937). Presumably *The Silver Palm* derived its rule from the following statement:

> "It has been said by this Court in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law." *The Chattahoochee*, 19 S. Ct. at 494; see also *The Umbria*, 17 S. Ct. at 616.

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[12] Of the cases cited in this paragraph only *The Umbria* was decided expressly under Article 16. The others were decided under the predecessor to Article 16, Rule 21 of The Rules of 1864, 13 Stat. 58, which commanded that "every steam vessel shall, when in a fog, go at a moderate speed." Article 16 did not change the moderate speed rule of these earlier cases. *The Nacoochee, supra*, 137 U.S. at 339.

Indeed, if this language *had* inspired the half-distance rule it would render the rule inapplicable to this case because the San Jacinto was not "going at the moderate speed required by law" (Finding of Fact (5) (c) at A. 23). But it is highly questionable whether this language supports a half-distance rule; at most it is the expression of a truism which the Court could not have intended to be the *test* of moderate speed.[13]

If this Court were to affirm the court of appeals' application of the half-distance rule it would be departing from the overwhelming consensus of judicial authority, altering the rule observed in at least five circuits, and establishing an American rule that would be unconsonant with the English rule—thus violating the principle of uniformity of maritime law upheld by this Court in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917).

C. The Asserted Virtues of the Half-Distance Rule

The court of appeals declares that the half-distance rule takes from the pilot's hands discretion as to what speed is reasonable under the prevailing circumstances and substitutes "a formula to fit all circumstances"

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[13] *The Umbria* and *The Chattahoochee* have also been cited for the proposition that moderate speed means "the lowest rate of speed consistent with good steerage way." *The Chattahoochee*, 19 S. Ct. at 494. However, this dictum has been properly recognized as being merely a reference to one of the circumstances which must be taken into account in deciding a case. See *Polarus S/S Co.* v. *T/S Sandefjord*, *supra*, note 11 at 272.

(A. 35). The court did not pause to consider whether it was free to adopt this position in view of the statutory language and legislative history.[14] The court's position also ignores the view of this Court that "in cases of this kind . . . something must be left to the judgment and discretion of the master," *The Umbria*, 17 S. Ct. at 615, and that Article 16 gives a navigator "discretion as to what shall be 'moderate speed' in a fog," *Lie* v. *San Francisco and Portland Steamship Co.*, 243 U.S. 291, 37 S. Ct. 270, 61 L. Ed. 726 (1917). The flaw in the appellate court's reasoning is that it *cannot* fashion a formula to fit all circumstances. The futility of such an exercise was expressed by the United States delegate to the 1889 International Conference:

> "So you will find it impossible to lay down a definite rule as to what moderate speed means under all the different and differing circumstances in which vessels will find themselves placed."

Quoted in KNIGHT, MODERN STEAMSHIP (10th ed. rev. 1941) 387. This view has been reiterated frequently in court opinions. See, e.g., the excerpt from Justice Brown's opinion in *The Chattahoochee* quoted at page 16, supra.

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[14] The British delegate addressing the 1889 International Conference in opposition to amending the second paragraph of Article 16 to require a mandatory stop: "I think it would not be wise to put that into the rules, because, *as has been often said with regard to this rule*, what we ought to avoid is the taking of the command of the vessel out of the seaman's hands. *Give him general rules and then let him be responsible for his conduct.*" The delegate's position was sustained by the Conference. LABOYTEAUX, *supra*, note at 88-97 (emphasis added).

Indeed, there is no more striking evidence of the unworkability and perniciousness of such a "universal" formula than the unjust result of its application of the facts of this case. Petitioner's tanker sighted the tugboat heading downstream and concluded, quite reasonably, that the tug would make a normal port-to-port passing.

> "Each of these vessels was entitled to presume that the other would act lawfully; would keep to her own side; if temporarily crowded out of her course, would return to it as soon as possible; and that she would pursue the customary track of vessels in the channel, regulating her action so as to avoid danger. * * * The rule applicable to them was that each should keep to her own starboard side of the channel." *The Victory*, 168 U.S. 410, 426, 18 S. Ct. 149, 156 (1897).[14]

The tanker posed no danger to the tug until the tug executed an unexpected, "erratic" and illegal turn. The tanker was not obliged to anticipate the tug's improper navigation. See *The Victory*, supra, 18 S. Ct. at 157; *Great Lakes Dredge & Dock Co.* v. *The Santiago*, 155 F.2d 148, 150 (2d Cir. 1946). Until the tug began its turn there was no significant risk of collision. See *The Victory*, 18 S. Ct. at 154, 156. The tanker's speed did not pose any danger to any vessel, and therefore was moderate. *The "Colorado,"* 91 U.S.

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[14] Compare *The Martello*, supra, 14 S. Ct. at 725, where a steamer was held to have been speeding "in a neighborhood where she is likely to meet vessels approaching the harbor from at least a dozen points on the compass."

692, 702-3 (1875); *The Nacoochee*, 137 U.S. 330, 339 (1890).

The court of appeals asserts that the half-distance rule "comes down hard on the side of safety" (A. 35). Again, the court does not inquire whether the language and intent of the statute permits it such latitude. Nor does the court consider whether it is more qualified to formulate a rule of navigational safety than the expert draftsmen of Article 16. In reality, the half-distance rule in some situations would *sacrifice* safety.

To begin with, there is the statement of the rule itself: where a vessel is navigating near a fog, "speed and visibility calculations must be performed: '* * * with reference to the distance within which she could be brought to a stop in the water, before *any* course of *any* vessel emerging from the fog on either side would cross her projected course along the fog bank at its nearest point.'" (A. 31). With all due respect to the court of appeals, this formula is unintelligible. For an illustration of the complicated charts, diagrams, and tabulations it calls for, see the opinion in *The Silver Palm*, 94 F.2d 754 (9th Cir. 1937). Presumably the court of appeals feels that these calculations are readily performable by a pilot maneuvering his ship in reduced visibilty. One wonders how the captain of the *tugboat* would have approached this problem, given his already confused condition. The court of appeals' *own* application of the rule does not shed any light on its meaning. A reasonable reading

of the rule would be this: where a ship is proceeding parallel to a fog bank *and reasonably can expect other vessels to emerge from the fog on a collision course* (a factor absent here), she should be able to stop before reaching a possible point of collision. But the court of appeals goes further than this: it holds that the ship must be able to stop *half way* to this point—even when there is no reason to expect emerging vessels! There is no justification for imposing such an excessive margin.

Strict adherence to the half-distance rule in this case could have resulted in chaos. The court of appeals calculated that the maximum lawful stopping distance of the tanker was 450 feet. While there is no evidence of the tanker's stopping ability, it is fair to assume that a ship over 500 feet in length with a 17,000 ton load would have to be traveling at a virtual snail's pace in order to stop in less than its own length. If the speed required was less than bare steerageway, then the tanker could have safely complied with the half-distance rule *only by dropping its anchor as it approached the fog.* The tanker then would have been obliged to remain at anchor until the fog lifted, even after the tug passed, for under the court of appeals' analysis, a radar observation that the fog bank contained no vessels would not remove the need for observing the half-distance rule (A. 33). Thus, any vessels which might have been following the tanker would have been faced with the choice of likewise dropping anchor or going around the tanker—

through the fog and against traffic![14A]

To summarize our contentions on this issue, the court of appeals has applied as a legal standard a mere rule of thumb which fails to take into consideration all of the circumstances required to be considered by the statute being enforced. In so doing, the court has reached a result which not only works an injustice to petitioner, but also establishes an unworkable standard of conduct for the future.

II. If Petitioner's Tanker Is Found Negligent and a Contributing Cause of the Collision, Damages Should Be Allocated Between the Vessels in Proportion to Their Respective Faults.

If the Court remands this case for a determination of whether the tanker's speed was moderate, it should also direct the district court that if it should find the tanker in violation of the moderate speed rule, it should allocate damages between petitioner and respondent in proportion to their respective degrees of fault. By respective degrees of fault we mean the degree to which each vessel by its misconduct contributed to the collision. It is necessary for this Court to decide this issue in order that the district court may fully be able to render justice to the parties. There is no impediment to the Court's deciding this issue; the state of the record is such that

[14A] 33 U.S.C. § 409:

"It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; * * *."

all of the facts necessary to an informed decision are before the Court, and no issue of constitutional magnitude is presented so as to invite the Court's traditional reluctance to decide constitutional issues. Alternatively, if this Court affirms the court of appeals' finding of negligence on the part of the tanker, then it should remand the case to the district court for apportionment of damages.

The court of appeals ordered damages equally divided between petitioner and respondent. The admiralty rule of equally divided damages, which applies when two vessels collide as the result of the negligence of both, has long been criticized as being primitive and unjust. The severe inequity of this rule is amply demonstrated by its application in this case. The court of appeals itself acknowledged that the fault of the tug was "more flagrant and shocking" than that of the tanker. The tug was negligent in speeding in fog, in failing to give appropriate signals, in failing to maintain a proper lookout, in making a U-turn across the path of the Santa Maria and in failing to keep the barge it was towing under control (A. 22). On the other hand, the claimed fault of the Santa Maria (speed only) is questionable; at most it amounted to, in the words of the district court, a "possible technical violation" (A. 24-25). It must also be noted that the court of appeals made no finding that the tanker's statutory violation contributed to the collision.[15] Thus, there is not only a great disparity of

[15] Under the rule of *The Pennsylvania*, supra, where a

culpability between the vessels, but the tanker's claimed error may not even have contributed to the collision! To divide damages equally in such a situation is manifestly unjust.

The rule of divided damages was adopted by this Court in *The Schooner Catharine* v. *Dickinson*, 58 U.S. (17 How.) 170 (1854). The Court applied the rule without careful consideration of its merits—observing only that it prevailed in lower federal courts, was the well settled rule in England, and was "the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation." 58 U.S. at 177-8.[16] It is remarkable that this Court has applied the rule repeatedly since 1854 without ever analyzing its implications. In the meantime, lower federal courts have protested the rule, England has long since repudiated it, and its supposed equitability is acknowledged by virtually no one.

The rule has been criticized repeatedly by lower federal courts as being "unfair,"[17] "illogical,"[18] "un-

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ship involved in a collision has violated a statute, it has the burden of proving that its violation *could not possibly* have been a contributing cause.

[16] The divided damages rule was adopted in England in the 1824 case of *Hay* v. *LeNeve*, 2 Shaw's Reports, 395. As in *The Schooner Catharine*, the English court did not give full consideration to the rule's implications, and based its decision on dicta from an earlier case. For a discussion tracing the rule's origin back to the medieval Laws of Oleron, see Sprague, "Divided Damages in Admiralty," 6 N.Y.U.L. Rev. 15 (1928).

[17] *Ahlgren* v. *Red Star Towing and Transp., Co.*, 214 F.2d 618, 620 (2d Cir. 1954).

[18] *Marine Fuel Transfer Corp.* v. *The Ruth*, 231 F.2d 319, 321 (2d Cir. 1956).

just" and "arbitrary,"[19] "antiquated,"[20] "not altogether rational" and a "vestigial relic"[21]. A few courts have attempted to defy the rule and apportion damages fairly. In *The Margaret*, 30 F.2d 923 (3rd Cir. 1928-9), the Third Circuit Court of Appeals ordered a division of 75%-25%, but modified to half-damages on rehearing, believing itself constrained by the Supreme Court rule. The Second Circuit has been more bold; in *The Ruth*, 135 F. Supp. 371 (1955), the district court ordered 60%-40% apportionment, which was affirmed without comment by the court of appeals. See 231 F.2d 319 (1956).

Even this Court has acknowledged the rule's potential for injustice. In *The Umbria*, 166 U.S. 404,

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[19] *Tank Barge Hygrade* v. *The Gatco N.J.*, 250 F.2d 485, 488 (3rd Cir. 1957).

[20] *National Bulk Carriers, Inc.* v. *United States*, 183 F.2d 405, 410 (Learned Hand, dissenting) (2d Cir. 1950), cert. den. 71 S. Ct. 89.

[21] *Oriental Trading and Transport Co.* v. *Gulf Oil Corp.*, 173 F.2d 108, 111 (2d Cir. 1949), cert. den. 69 S. Ct. 1162.

Other decisions critical of the rule include: *In re Adams Petition*, 125 F. Supp. 110 (S.D. N.Y. 1954); affd. 237 F.2d 884 (2d Cir. 1956), cert. den. 352 U.S. 971, 77 S. Ct. 364 (1957); *Luckenbach S. S.* v. *United States*, 157 F2d 250 (2d Cir. 1946); *The City of Chattanooga*, 79 F.2d 23 (2d Cir. 1935); and *St. Louis-San Francisco Ry.* v. *M/V D. Mark*, 243 F. Supp. 689 (S.D. Ala. 1965).

Examples of academic criticism are: Staring, "Contribution and Division of Damages in Admiralty and Maritime Cases," 45 Cal. L. Rev. 304 (1957); Albritton, "Division of Damages in Admiralty—A Rising Tide of Confusion," 2 Journal of Maritime Law and Commerce, 322 (1971); Jackson, "The Archaic Rule of Dividing Damages in Marine Collisions," 19 Ala. L. Rev. 263 (1967); Mole & Wilson, "A Study of Comparative Negligence," 17 Corn. L. Q. 333 (1932); and Huger, "The Proportional Damage Rule in Collisions at Sea," 13 Corn. L. Q. 531 (1928).

17 S. Ct. 610, 41 L. Ed. 1053 (1897), a case involving a factual situation much like the one here, the Umbria was proceeding full speed through a fog when it collided with the Iberia, which had improperly changed course. Even though both vessels were clearly negligent, this Court applied the rule of *The City of New York*[22] to hold the Umbria *solely* at fault because of its "gross" misconduct. 17 S. Ct. at 612-613. The irony of this decision is that in seeking to avoid the unfairness of arbitrarily dividing damages between the vessels, the Court chose to arbitrarily *absolve* one vessel from its fault and subject the other to liability *in excess of* its fault.

Perhaps the most telling criticism of the equal division rule is the oft-noted fact that the United States is the only major seafaring nation in the world to adhere to it. See Staring, "Contribution and Division of Damages in Admiralty and Maritime Cases," 45 Cal. L. Rev. 304, 340-341 (1957). The other nations—including England, from which we obtained the rule—have adopted the 1910 Brussels Collision Convention which allocates fault proportionately in cases where it is possible to do so.[23] The rule which peti-

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[22] 147 U.S. 72, 85 (1893) "* * * Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

[23] Relevant parts of the Convention are reproduced in the Appendix to this brief.

tioner asks this Court to adopt is set out in the first paragraph of Article 4 of the Convention:

> "If two or more vessels are in fault, the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally."

It should be noted that petitioner is not asking this Court to abandon completely the half-damages rule. In cases where it is impossible to determine relative fault, or where the faults are equal, the rule proposed by petitioner would require equal apportionment of damages. But in cases where the evidence establishes a disparity of fault, as in this case, damages should be allocated proportionately.

By adopting the proposed rule of comparative fault this Court would bring the American rule into harmony with the rule of every other major maritime nation and thus serve the objective of a uniform maritime law which was extolled in *Southern Pacific* v. *Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917). One consequence of our rule being out of step with the rest of the maritime world is transatlantic forum shopping. See G. GILMORE AND C. BLACK, JR., THE LAW OF ADMIRALTY (1957), 439. The authors postulate a case in which Vessel A is damaged $100,000 and would be 80% at fault, while Vessel B, 20% at fault, is damaged $50,000. In the United States Vessel B would have to pay Vessel A $25,000, while in

a country adhering to the Brussels Convention, Vessel A would have to pay Vessel B $20,000. In many collision cases, the authors conclude, "getting the case into a United States court is a tactical prize of great cash value." *Id.* at 439-440. See, e.g., *Isbrandtsen Co.* v. *Lloyd Brasiliero*, 85 F. Supp. 740 (E.D. N.Y. 1949).

Adopting the proposed rule would also bring harmony to our own system of admiralty law by eliminating the anomaly of applying a mutual fault rule where property damage is involved, and a comparative fault rule where personal injury is involved. See *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953).

It is important to note that in its brief in opposition to our petition for writ of certiorari, respondent does not contradict any of our contentions as to the merits of the mutual fault rule; rather, respondent's sole argument is that Congress, and not this Court, should change the rule (Br. 18). In support of this argument, respondent recites that the rule has been "settled law" for over 100 years, and that neither Congress nor private interests are seeking to change it. None of these contentions has merit. Where there is virtual unanimity of opinion that a judicial rule is inequitable, the fact that it is an *old* rule hardly justifies its continued observance. See *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 403-5, 90 S. Ct. 1772, 26 L. Ed. 339 (1970). It must be remembered that this is a *judicial* rule, and what judges have made, judges generally can unmake. It must also be

remembered that the mutual fault rule is a rule of *damages* and not one which regulates conduct directly; thus, there is absent from this case the problem of upsetting the settled expectations of parties who would be affected by a change in the rule. See 398 U.S. at 403-4. This Court has long maintained that damages in admiralty are given or withheld upon enlarged principles of justice and equity and are within the discretion of the courts. *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).

Some of the most creative law-making of this court has taken place in the field of admiralty. *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U.S. 684, 70 S. Ct. 861, 94 L. Ed. 1206 (1950). This is especially so in the area of remedies. In *The Max Morris*, 137 U.S. 1 (1890), the Court refused to apply the common law doctrine of contributory negligence in an admiralty case, which would have barred a longshoreman from recovering from a vessel for personal injury. In so ruling, the Court affirmed a decree mitigating damages to the extent of the longshoreman's negligence. This decision was subsequently implemented by Congress in the Merchant Marine (Jones) Act, 46 U.S.C. § 688. *The Max Morris* rule was extended to *civil* actions for maritime personal injuries brought in federal courts in *Pope & Talbot, Inc.* v. *Hawn*, supra. The following statement by the Court in that case is particularly pertinent:

> "The harsh rule of the common law under which contributory negligence wholly barred an

injured person from recovery is completely incompatible with modern admiralty policy and practice. *Exercising its traditional discretion,* admiralty has developed and now follows its own *fairer and more flexible* rule which allows such consideration of contributory negligence in mitigation of damages *as justice requires.*" 346 U.S. at 408-9 (Emphasis added).

The most recent example of this Court's broad discretion over maritime tort remedies is *Moragne* v. *States Marine Lines, Inc.*, supra, where the Court created a remedy for wrongful death arising from unseaworthiness in state territorial waters. These decisions illustrate that it is exceptional for the Court to defer to the legislature on matters of maritime tort remedy.[24]

Respondent points out that Congress has twice declined to adopt the 1910 Brussels Convention. The convention was first submitted to the Senate in 1937. KNAUTH, BENEDICT ON ADMIRALTY (7th ed. rev.) 38. It was not ratified for two reasons: a poor translation of the French text resulted in a misunderstanding regarding the Convention's effect upon certain

[24] One such exception was *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S. Ct. 277, 96 L. Ed. 318 (1952). A ship repairer's employee was injured while making repairs on a ship. The employee sued the ship owner for negligence and unseaworthiness, and the ship owner sought contribution from the ship repair company for its negligence. The Court denied contribution, in part because it was uncertain as to the manner in which a contribution scheme would operate in conjunction with the Longshoremen's and Harbor Workers' Compensation Act. 342 U.S. at 280. In the present case, there is no danger of the comparative fault rule being incompatible with federal legislation.

legal presumptions; and cargo interests objected to the second paragraph of Article 4 which eliminates joint and several liability of the vessels for cargo damage. *Staring, supra,* at 343. For a thorough discussion of this opposition, see Note, "The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Convention to Achieve International Agreement on Collision Liability, Liens and Mortgages," 64 Yale L.J. 878 (1955). The Convention was resubmitted to the Senate in 1962. Again, cargo owners opposed adoption because it would not permit them to recover their losses in full from the non-carrying vessel. BAER, *Admiralty Law of the Supreme Court* (2d ed.) 414-5. *The rule advocated by petitioner would not change in any way the cargo owner's right to recover from the non-carrying vessel.* Petitioner's rule would amount to the adoption only of the first paragraph of Article 4, and not the second. Since this rule would not affect cargo owners, they would have no objections to its adoption.

American shipowners are enthusiastically in favor of the change. Note, 64 Yale L.J. at 882. It will prevent their having to pay a part of the loss in excess of their ship's proportionate degree of fault, and also the inequitable result of a grossly negligent vessel not having to pay her share of the loss. See Huger, "The Proportional Damage Rule in Collisions at Sea," 13 Corn. L. Q. 531, 546 (1928). The Departments of State and Commerce, and the Maritime Commission, are on record as supporting the convention in the strongest terms. See Note, 64 Yale L.J. at 890. It is unlikely that insurance companies would object to

the change; since the vast majority of ship collision cases are prosecuted as well as defended by insurance companies, 13 Corn. L.Q. at 546 n. 52, a change in the legal principles apportioning liability would have no effect on the industry as a whole. Individual insurance companies might be hurt if they made a practice of insuring bad risks, but even this could be compensated by higher premiums, which would promote a more equitable allocation of insurance costs.

The admiralty bar in 1961 voiced its approval of "the basic principles" of the Convention. See THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, REPORT No. 452, at 4854-57 (Feb. 1962).[25] This approval marked a change in the position of the organized bar. In 1928, the American Bar Association recommended against adopting a comparative fault rule in collision cases. See Mole & Wilson, "A Study of Comparative Negligence," 17 Corn. L. Q. 333, 348 (1932). While it is highly doubtful that the A.B.A. would reaffirm its position today, it nevertheless is worth considering its objections to comparative fault in 1928, as reported by Mole & Wilson at 348-59.

1. *The rule of proportionate damages would impose too great a burden on judges.* It has been said that the difficulty in assigning degrees of fault is the *only* plausible objection to the rule. See G. GILMORE

[25] A resolution to this effect was adopted by a vote of 166 to 84. The minority group objected to approval of the provision of the Convention which would eliminate joint and several liability to cargo owners. See BAER, supra, at 414, 415 n. 17.

AND C. BLACK, supra, at 440. Nonetheless, countries which have adopted the Brussels Convention report no difficulty in applying it. See Mole & Wilson at 348; also *In re Adams Petition*, 125 F. Supp. 110, 114 aff'd 237 F.2d 884 (2d Cir. 1956), cert. den. 352 U.S. 971, 77 S. Ct. 364 (S.D. N.Y. 1954). Judges are now called upon by both state and federal law—including maritime statutes—to apportion fault by degrees. See, e.g., Merchant Marine (Jones) Act, 46 U.S.C. § 688; Death on the High Seas Act, 46 U.S.C. § 766; Federal Employers Liability Act, 45 U.S.C. § 51-59; and see PROSSER, LAW OF TORTS (4th Ed.) 435-438, for a listing of the dozens of state comparative negligence laws. Judges occasionally may be inaccurate in allocating fault in precise percentages, but such minor imperfections are preferable to the gross misallocations which occur under the present rule.

2. *The "in extremis" rule*[26] *would be emasculated.* In point of fact, the in extremis rule would operate precisely the same under comparative fault. If a ship has not been negligent so as to place herself in jeopardy, she will be absolved from blame; but if her prior negligence has caused her predicament, she should bear her proportionate share of the damages. See Mole & Wilson at 351.

3. *The City of New York rule is sufficient for*

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[26] A vessel in imminent danger of collision owing *solely* to the fault of another vessel is not held to strict accountability for her acts in such emergency. See *Villain & Fassio E. Campagnia* v. *Tank Steamer E. W. Sinclair*. 207 F. Supp. 700 (S.D. N.Y. 1962), aff'd 324 F.2d 563.

practical purposes. As we have pointed out, the *City of New York* rule is *in*sufficient from a standpoint of fairness. If a vessel has been negligent, even to a minor degree, it should not be absolved from fault—and the other vessel penalized—simply because the other vessel's negligence was more flagrant.

4. *Collision litigation would be carried to common law courts.* Collision cases may be tried in common law courts under the present rule. There is no apparent reason for not permitting this to continue under a comparative fault rule. In any event, this presumed problem could be corrected by legislation if necessary.

5. *Appeals would be increased and compromises made more difficult.* This argument is speculative. Under the liberalized discovery rules, the relative faults of the vessels will be evident to the parties prior to trial. The vessel more at fault will have a greater incentive to settle under a comparative fault rule than under the mutual fault rule. Also, under the mutual fault rule a ship owner whose vessel has been substantially less negligent than the other vessel would be inclined to take his chances in being exculpated by a court rather than agree to a 50-50 settlement. Nor would appeals be increased. The trial judge has great latitude in awarding damages, and his judgment should not lightly be disturbed. *Drake* v. *E. I. Du Pont deNemours & Co.*, 432 F.2d 276 (5th Cir. 1970); *cf. McAllister* v. *United States*, 348 U.S. 1, 75 S. Ct. 6, 99 L. Ed. 3 (1954). Since appellate review of damage apportionment would be highly

restricted, appeals would be discouraged. See *Norton* v. *Warner*, 321 U.S. 565, 64 S. Ct. 747, 749-750, 88 L. Ed. 931 (1944). English admiralty courts employ the same rule. See *The Peter Benoit*, 84 L.J.R. 87 (1915).

Respondent would have this Court conclude from Congress' unreadiness to enact the Brussels Convention *in toto* that Congress disapproves of the principle of comparative fault. As we have shown, Congress' inaction was unrelated to the Convention provision respecting comparative fault. To obtain an accurate perception of congressional policy, this Court must examine the whole course of congressional enactments in the field of maritime tort law, as it did in *Moragne* v. *States Maritime Lines, Inc.* See 398 U.S. at 392-3. Since this Court's adoption of the mutual fault rule in 1854, Congress has enacted the Federal Employers Liability Act, the Merchant Marine (Jones) Act,[27] and the Death on the High Seas Act—all of which provide for comparative negligence, the latter two involving maritime torts.[28] This legislative trend is compelling evidence that Congress in fact supports the principle of comparative fault.[29]

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[27] It will be recalled that Congress was inspired to enact the Jones Act by this Court's decision in *The Max Morris*.

[28] This federal trend toward liability in proportion to fault has been mirrored by state legislative enactments adopting the comparative fault standard. See PROSSER, supra, at 435-8.

[29] In *Moragne* this Court created a remedy for wrongful death arising from unseaworthiness after concluding that Congress had given no affirmative indication of an intent to *preclude* such remedy. 398 U.S. at 393.

In the final analysis, the mutual fault rule has been thoroughly discredited. Judges, scholars, lawyers, the executive branch and the shipping industry seek adoption of the comparative fault rule. Comparative fault has been widely implemented by federal and state legislation. Since the comparative fault rule is remedial in nature, a rule of damages within traditional judicial discretion, and a rule in the realm of this Court's broad admiralty powers, there is no obstacle to its adoption by this Court. Such action by the Court would be consistent with the modern admiralty policy expressed in such decisions as *Pope & Talbot* and *Moragne*, as well as in modern legislation, to develop "fairer and more flexible" rules "as justice requires." *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. at 409. The mutual fault rule is repugnant to this policy. It is a legal dinosaur which has no place in the law books of the 20th century. The need for its abrogation by this Court was well-stated by a distinguished admiralty practitioner:[30]

> "The present practice is a discredit to admiralty, which prides itself on its enlightened justice, flexibility, and equity and has formerly pointed out the path of progress to common law jurisdictions that today, in this vital matter, have overtaken and passed it. This is not the result of a lack of desire on the part of the admiralty judges but of the failure of the admiralty bench and bar to consult their history and to appreciate that, if they desire justice, they have only to do it."

[30] Staring, supra, at 344.

CONCLUSION

Petitioner requests that the decision of the court of appeals be reversed and the judgment of the district court reinstated; or in the alternative, that the case be remanded to the district court for a determination of the question whether the Santa Maria's speed was moderate, with instructions to allocate damages in proportion to fault should the Santa Maria be found negligent. If the Court affirms the court of appeals' finding of negligence on the part of the Santa Maria, then it should remand this case to the district court for allocation of damages in proportion to fault.

Respectfully submitted,

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APPENDIX

ARTICLES 1 THROUGH 4 OF THE BRUSSELS COLLISION CONVENTION OF 1910

Article 1. Where a collision occurs between seagoing vessels or between seagoing vessels and vessels of inland navigation the compensation due for damages caused to the vessels, or to any things or persons on board thereof, shall be settled in accordance with the following provisions, in whatever waters the collision takes place.

Article 2. If the collision is accidental, if it is caused by *force majeure*, or if the causes of the collision are in doubt, the damages shall be borne by those who have suffered them.

This provision shall be applicable notwithstanding the fact that the vessels, or any of them, may be at anchor (or otherwise made fast) at the time of the casualty.

Article 3. If the collision is caused by the fault of one of the vessels, liability to make good the damages shall attach to the one which has committed the fault.

Article 4. If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally.

The damages caused either to the vessels, or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board, shall be borne by the vessels in fault in the above proportion without joint and several liability toward third parties.

In respect of damages caused by death or personal injury, the vessels in fault shall be jointly as well as severally liable to third parties, without prejudice to the right of recourse of the vessel which has paid a larger part than that which in accordance with the provisions of the first paragraph of this article she ought ultimately to bear.

It is left to the law of each country to determine, as regards such recourse, the scope and effect of any legal or contractual provisions which limit the liability of the owners of a vessel toward persons on board.